

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNELL LOWE,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2003

No. 238169

Wayne Circuit Court

LC No. 01-000746

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree felony-murder, MCL 750.316(1)(b), first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony, MCL 750.227b, second-degree fleeing and eluding a police officer, MCL 257.602a(4)(b), and possession of a firearm by a felon, MCL 750.224f. The trial court sentenced him to life imprisonment for the first-degree felony-murder conviction, life imprisonment for the first-degree premeditated murder conviction, four to ten years' imprisonment for the second-degree fleeing and eluding a police officer conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences for first-degree murder, felony-firearm, second-degree fleeing and eluding a police officer, and felon in possession of a firearm, but we remand this case to the trial court to modify the judgment of sentence to reflect that defendant was convicted of one count of first-degree murder supported by two theories: premeditation and felony-murder.

Defendant first argues that the trial court abused its discretion in admitting improper character evidence that the victim, Dwayne Duncan, had no prior criminal record; defendant argues that a new trial should be granted for this reason. We disagree. A defendant must object to the admission of evidence in the trial court on a specific basis and raise the same basis on appeal in order to preserve for appeal a challenge to the evidence. MRE 103(a); *People v Aguwa*, 245 Mich App 1, 67; 626 NW2d 176 (2001). Defendant did not argue at trial that the prosecutor introduced improper character evidence that Duncan had no prior criminal record, and absent an objection, appellate review is limited to whether the admission of the evidence constituted a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To obtain relief, defendant must show that the error was plain, i.e., clear or obvious, and that it affected defendant's substantial rights by prejudicing the outcome of the proceedings. *Id.* Moreover, reversal is warranted only if the plain error resulted

in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Generally, all relevant evidence is admissible, and irrelevant evidence is not. See MRE 402 and *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). There is no question that evidence of Duncan's good character and lack of a prior criminal record was relevant to whether defendant acted in self-defense, because it tended to make it less likely that Duncan aggressively attacked defendant in a sexual manner.

MRE 404 provides, in part:

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

\* \* \*

(2) *Character of alleged victim of homicide.* When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution to rebut evidence that the alleged victim was the first aggressor[.]

In his opening statement, defense counsel stated to the jury that Duncan was a large man who had been engaging in a sexual relationship with defendant for a couple of weeks. Defense counsel further submitted to the jury that defendant was put in a position, that he did not want to go any further, and that defendant pulled the gun and shot Duncan because he did not want to be sexually penetrated by Duncan. Defense counsel also asserted that Duncan may have been the perpetrator of a sexual assault. Defendant's theory, which was raised during his opening statement, was that Duncan was the aggressor in a sexual manner and that, because of this, defendant shot Duncan in self-defense. The evidence that Duncan had no prior criminal record was introduced by the prosecutor to rebut defense counsel's contention that Duncan sexually attacked defendant. Under MRE 404(a)(2), it is proper for a prosecutor to introduce evidence to rebut a defendant's theory that a homicide victim was the aggressor.

However, even when character evidence of a homicide victim is admissible under MRE 404(a)(2), MRE 405(a) limits the introduction of this evidence on direct examination to "testimony as to reputation or by testimony in the form of an opinion." It is only during cross-examination that the inquiry may delve into specific acts. MRE 405(a).

MRE 405 provides:

(a) **Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as

to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

“As a general rule, the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.” *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998).

The prosecutor asked a police officer if the latent print section found anything on Duncan and if Duncan had any kind of record regarding sexual assaults. The officer answered no. During closing arguments, the prosecutor argued, “This is not a man who had a secret life someplace in there. . . . There’s no history of convictions for that. There is no history of contacts with the police in any way, shape or form.”

The prosecutor could have offered evidence that Duncan had a reputation for peacefulness. Under MRE 405(a), this is the proper method of establishing a character trait or propensity. However, because the evidence at issue related to specific conduct, we conclude that it was inadmissible to support the prosecutor’s claim that it would be out of Duncan’s character to behave in a sexually aggressive manner. We conclude that it was not proper for the prosecution to introduce evidence that Duncan had no prior criminal record.

Although it was error to introduce the evidence, it was not so prejudicial that it affected defendant’s substantial rights; in other words, it did not affect the outcome of the trial. *Carines, supra*, 763-764. There was overwhelming evidence of defendant’s guilt. There was evidence that Duncan was going to get mousetraps and ended up shot to death, from close range, by defendant. There was evidence that defendant was familiar with the area where Duncan’s body was discovered but that Duncan was not familiar with the area. Defendant stole Duncan’s van, and there was evidence that he stole Duncan’s wallet. Defendant fled from the police in Duncan’s van, causing a high-speed chase. Defendant admitted to shooting Duncan in his statement to a police officer. Given the above evidence, the introduction of Duncan’s lack of a prior criminal record did not affect defendant’s substantial rights. The evidence that was improperly introduced by the prosecution was not outcome-determinative in relation to the substantial amount of evidence against defendant. Reversal is unwarranted.

Next, defendant claims that the trial court abused its discretion in refusing to grant a directed verdict on the first-degree premeditated murder charge. We disagree. We review a motion for a directed verdict de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *Id.*

The offense of premeditated first-degree murder is a specific intent crime and requires proof that the defendant had an intent to kill. *People v Herndon*, 246 Mich App 371, 386; 633

NW2d 376 (2001). “To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of premeditation and deliberation. See *Herndon*, *supra*, 246 Mich App 415.

The prosecution presented sufficient circumstantial evidence to establish that premeditation and deliberation occurred. Indeed, a finding of premeditation was supported by the circumstances surrounding the killing. There was evidence that Duncan was going to get mousetraps at K-Mart on Seven Mile Road and Meyers Road and that he ended up shot to death on Omira Street and East Nevada Street, an area with which Duncan was not familiar, but with which defendant was familiar. Duncan was shot at close range and left dead in a vacant lot. Viewing the evidence in the light most favorable to the prosecution, it demonstrates that defendant had the opportunity to reflect upon his actions. Duncan was found in a remote area, suggesting that defendant anticipated the possibility that Duncan might call for help. Defendant took Duncan’s automobile, and there was evidence that defendant also took Duncan’s wallet, leaving him with no money except seventy-two cents. Defendant, driving Duncan’s van, fled police officers that were attempting to pull him over.

From these methodical actions, the jury could reasonably infer that defendant had an opportunity to take a second look before killing the victim. We note that credibility of the witnesses is a matter for the trier of fact to determine. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The evidence was sufficient to present the question of premeditation and deliberation to the jury. A defendant’s actions after the crime and “the circumstances of the killing itself, including the weapon used and the location of the wounds” inflicted may be considered in order to establish premeditation. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 783 (1998). The evidence, when viewed in the light most favorable to the prosecution, could lead to the conclusion that Duncan was carjacked, robbed of money and his wallet, and taken to a secluded area where he was shot at close range and killed. In sum, the evidence was sufficient for a rational trier of fact to conclude that the elements of premeditated murder were proven beyond a reasonable doubt. Therefore, the trial court did not err in submitting the first-degree premeditated murder charge to the jury.

Lastly, defendant argues that his separate convictions of first-degree premeditated murder and first-degree felony-murder constituted violated the prohibition against double jeopardy. We agree. To preserve a double jeopardy issue for appeal, the issue must be raised at trial. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). Defendant first raised the double jeopardy issue on appeal and thus failed to preserve the issue for appellate review. However, a double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it in the trial court. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). However, to obtain relief, a defendant must show that a plain error occurred that affected his substantial rights, and reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant’s innocence, *People v Davis*, 250 Mich App 589, 591-592; 649 NW2d 118 (2002).

"Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy." *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). The normal remedy for conviction of multiple offenses in violation of double jeopardy protections is to vacate the lower charge. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). However, upon conviction of first-degree premeditated murder and first-degree felony-murder "[t]he proper remedy is to modify the judgment of conviction and sentence to specify a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder." *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001); *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). Therefore, defendant's first-degree murder conviction is affirmed, but the case is remanded for modification of the judgment of sentence to specify that it is a single conviction of first-degree murder supported by two theories: premeditation and felony-murder.

Defendant's convictions and sentences for first-degree murder, felony-firearm, second-degree fleeing and eluding a police officer, and felon in possession of firearm are affirmed, but this matter is remanded to the trial court for the limited purpose of modifying the judgment of sentence to reflect that defendant was convicted of one count of first-degree murder supported by two theories: premeditation and felony-murder. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper